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In the Supreme Court of the United States

OCTOBER TERM, 1979

THE MENOMINEE TRIBE OF INDIANS, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 1a-19a) is reported at 607 F. 2d 1335. The opinion of the Trial Judge (Pet. App. 20a-54a) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 17, 1979. The petition for a writ of certiorari was filed on January 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims has jurisdiction under 28 U.S.C. 1491 and 1505 to determine if the United States is liable in damages because Congress enacted a concededly

constitutional statute terminating federal supervision of the Menominee Tribe, allegedly in breach of the fiduciary duty owed by the United States to the Tribe.

STATEMENT

This is an action by the Menominee Tribe of Indians and certain of its members and represenatives to recover damages for injuries alleged to have resulted from enactment by Congress of the Menominee Termination Act of 1954, 25 U.S.C. (1970 ed.) 891 *et seq.* (Pet. App. 128a-135a). The background of the Termination Act is described in this Court's opinion in *Menominee Tribe* v. *United States*, 391 U.S. 404, 408-410 (1967).

1. The Menominee Tribe was granted a reservation in 1854 by the Treaty of Wolf River, 10 Stat. 1064 (Pet. App. 136a-140a), under which the Tribe also retroceded certain lands it had acquired under an earlier treaty.

A century later, in 1954, implementing its then-current policy, Congress enacted the Menominee Termination Act, providing a general procedure and timetable for termination of federal supervision of the Menominee Tribe. Under the Act, the Tribe was to formulate a plan for future control of tribal property and service functions theretofore conducted by the United States. On or before April 30, 1961, the Secretary was to transfer to a tribal corporation or to a trustee chosen by him all property held in trust by the United States. The Termination Act further provided that after transfer to the Tribe of title to property previously held in trust by the United States, tribal members were not to be entitled to special services performed by the United States for Indians and that all statutes specifically affecting Indians would no longer be applicable to the Tribe. The Act was duly carried out. See *Menominee Tribe* v. *United States, supra*, 391 U.S. at 408-409.

2. Dissatisfied with Congress' termination decision and its results, the Tribe (together with certain of its representatives and its members) filed the present action in April, 1967, in the Court of Claims under 28 U.S.C. 1491 and 1505. The central thrust of the claim is that passage and implementation of the Act terminating federal supervision of the Tribe and its property constituted a breach of trust owed by the United States to the Menominees.[1]

On July 19, 1978, the Trial Judge filed an opinion and findings of fact on the question of liability, without determining damages (Pet. App. 20a-124a). In the opinion and findings, the Trial Judge concluded that the Menominee Termination Act was not in the petitioners' best interest, was ill-advised, and had a "disastrous" effect upon their assets and way of life. The Trial Judge further found that the termination decision made by Congress in passing the Act was not warranted by criteria for termination previously suggested by the Acting Commissioner of Indian Affairs in 1947, that the Tribe and its members did not consent to termination, that the United States failed adequately to assist the Menominees to prepare for termination, that "no reappraisal of the policy of termination" was made when it appeared the Menominees were not prepared for it, and that a period of one to two generations of phased withdrawal of federal supervision would have been a more appropriate method of termination (Pet. App. 61a-62a, 123a-124a). For these reasons, the Trial Judge concluded that enactment of the Menominee Termination Act constituted a breach of Congress' fiduciary obligation to petitioners (Pet. App. 51a-54a).

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[1]Petitioners also alleged that certain actions taken in implementing the termination constituted a taking of property without just compensation, in violation of the Fifth Amendment (Pet. App. 3a). These constitutional claims remain open on remand to the Trial Judge, and are not involved in the instant petition (see page 6, *infra*).

3. In its en banc review of the Trial Judge's decision, the Court of Claims did not reach the question whether there had been a breach of duty, imposed by statute or treaty, in terminating federal supervision of the Menominee Tribe (Pet. App. 5a). Instead, the court unanimously held that Congress, in enacting 28 U.S.C. 1491 and 1505, "has not consented to suit by Indians in this court on non-constitutional claims for breach of trust based directly on the passage and enactment by Congress of legislation it considers appropriate but which the claimant deems a violation of a fiduciary obligation" (Pet. App. 5a). The court noted that the Trial Judge had "assumed without discussion that there was jurisdiction over all Indian claims for breach of trust, of whatever character, and made absolutely no distinction * * * between the actions of Congress setting policy and directing conduct and the conduct of executive officials contrary to Congressional policy and directives" (*id.* at 5a n.5). The Court of Claims concluded, however, that the controlling jurisdictional statutes did not give it "authority to entertain a suit contending that a statute passed by Congress, though valid and constitutional, is nevertheless a breach of trust owed by the Federal Government to the Indians" (*id.* at 5a).

Looking first to the Tucker Act, 28 U.S.C. 1491,[2] the Court of Claims reasoned that petitioners' claim was not "founded" upon an Act of Congress, because the Termination Act was cited as the *breach*, not the *source* of its rights. Nor, in the court's view, could the claim be

[2]28 U.S.C. 1491 provides in pertinent part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

"founded" upon "any regulation of an executive department," because any prior regulation would have been displaced by the Termination Act. Further, the court reasoned that even if the early treaties upon which petitioners relied could possibly be deemed an "express or implied contract with the United States," these treaties could not form the basis of a claim against the United States because they had been subsequently modified or displaced by a valid Act of Congress—the Termination Act. For the same reason, the court could not find the requisite consent to suit here for "liquidated or unliquidated damages in cases not sounding in tort" (Pet. App. 9a).

In the court's view, its conclusions regarding the scope of 28 U.S.C. 1491 applied equally to 28 U.S.C. 1505,[3] "which substantially tracks section 1491 and has been construed to cover the full ground of the latter" (Pet. App. 9a). Ultimately, the Court of Claims held that it did not have jurisdiction over claims based on Congress' passage of the Termination Act or the Interior Department's implementation of it, so far as its officials faithfully carried out the congressional mandate. To the extent that Interior officials may have *violated* any requirement of the Termination Act (or some other statute), these matters were left to further

[3]28 U.S.C. 1505 provides:

> The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive Orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

proceedings before the Trial Judge on remand,[4] along with any claims based on the Constitution (Pet. App. 18a).

ARGUMENT

The issue tendered in this case is one of first impression, as petitioners stress (Pet. 19-20; see, also, Pet. App. 7a). Had it been decided the other way, its importance could not be gainsaid; in that event, we should most certainly have sought review here. But it hardly follows that the present petition for certiorari should be granted. The Court cannot entertain every novel contention which, if successful, would have significant consequences: the argument must also have colorable merit. In our view, this is one of those instances in which the decision below—reached by a unanimous Court of Claims sitting en banc, in a well-reasoned and thorough opinion—is so plainly correct that it properly may be left unreviewed.

1. The proposition advanced by petitioners is truly startling: that, by a permanent general statute enacted in 1946, the Congress bound itself henceforth to pay damages to any Indian Tribe whenever, in the future, its own legislation affecting the Tribe could be found not to have served the Tribe's best interests, albeit no taking of property without just compensation or other unconstitutional action occurred, and notwithstanding the legislation complained of obviously contemplated no such payments. The case is wholly unlike *United States* v. *Sioux Nation*, cert. granted, No. 79-639 (Dec. 10, 1979), in which the claim is that the *Constitution* requires an award to compensate for a congressional taking. Nor do we deal with a situation like that presented in *United*

[4]Whether or not such claims are open may depend on this Court's decision in *United States* v. *Mitchell*, No. 78-1756. But that question is not before this Court on the present petition.

States v. *Mitchell*, No. 78-1756 (argued Dec. 3, 1979), where the complaint is that Executive officials *violated statutory* commands. And, finally, the present claim bears no resemblance to that made in *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968), involving a dispute about the effect of the Termination Act.[5] Here the heart of the case is that the Termination Act itself constituted a breach of trust which entitles the Tribe to recover damages—not because the Act expressly or impliedly so provides,[6] or because the Constitution requires it, but because, it is said, Congress has, by enacting 28 U.S.C. 1505 in 1946, generally subjected the United States to liability in such circumstances.

2. To be sure, on a number of occasions, Congress has, by special jurisdictional statutes, expressly authorized recovery in respect of past injustices done a particular Tribe, sometimes by valid legislative action. See, *e.g.*, *United States* v. *Mille Lac Chippewas*, 229 U.S. 498, 509 (1913); *United States* v. *Tillamooks*, 329 U.S. 40 (1946). In 1946, by the Indian Claims Commission Act, 25 U.S.C. 70a, Congress determined to afford a like opportunity to all Tribes, but only in respect of *past* wrongs and on condition that the claim was filed in a five-year period. These are,

[5]Equally remote, of course, are cases in which implementation of an Act of Congress was sought to be enjoined on the ground that it violated the Due Process Clause of the Fifth Amendment. *E.g.*, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903); *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73 (1977).

[6]Needless to say, it is perfectly clear that the Menominee Termination Act itself did not intend to subject the United States to liability in damages for "breach of trust." Indeed, in the earlier *Menominee* case, *supra*, 391 U.S. at 413, an important consideration influencing the Court's conclusion that the Act had not extinguished hunting and fishing rights was the obvious determination of the Congress to end, rather than add to, the Government's financial obligations to the Tribe.

indeed, exceptional provisions. But, precisely because the relief made available was extraordinary, the offer was carefully circumscribed. Congress recognized that all branches of government had often dealt unjustly with the Tribes in years gone by and was willing to make restitution. That, however, is a far cry from contemplating that Congress would continue to pass laws in derogation of its responsibilities to the Indians and providing, *in advance*, for monetary relief in respect of such future legislation.

Attributing such a purpose to the Congress of 1946, when 28 U.S.C. 1505 was enacted as Section 24 of the Indian Claims Commission Act, ch. 959, 60 Stat. 1055, is to posit something wholly unprecedented and highly improbable. Only the clearest declaration would justify a conclusion at once very cynical and unnaturally generous. Nothing in the 1946 Act discloses any such intent. On the contrary, the scheme of the statute and its legislative history clearly point in the opposite direction.

3. In *United States* v. *Testan*, 424 U.S. 392, 398 (1976), the Court held that 28 U.S.C. 1491 does "not create any substantive right enforceable against the United States for money damages." Petitioners do not contend otherwise and, in fact, largely abandon reliance on 28 U.S.C. 1491 as a basis for jurisdiction here.[7] Rather, petitioners essentially argue that 28 U.S.C. 1505 is cast more broadly than 28 U.S.C. 1491 and that it is this broader reach that covers their claims (see, *e.g.*, Pet. 11-12). But the structure and legislative history of the Indian Claims Commission Act, which is the source of Section 1505, demonstrate that the provision now invoked was intended to have the same coverage of

[7]Petitioners do refer to 28 U.S.C. 1491 in the question presented (Pet. 2), but in their discussion of the reasons for granting the writ (Pet. 11-20), they rely exclusively on the argument that the court below erroneously interpreted 28 U.S.C. 1505.

claims by Indian Tribes as does 28 U.S.C. 1491 with respect to claims by non-Indians.

The Indian Claims Commission Act implemented a dual approach to the determination of Indian claims. For claims arising prior to the effective date of the Act (August 13, 1946), the Indian Claims Commission was authorized to "hear and determine" claims against the United States based on legal and equitable principles and on consideration of "fair and honorable dealings that are not recognized by any existing rule of law or equity." 25 U.S.C. 70a. Congress intended to place tribal claimants in a preferential position by authorizing determination of these historical claims based on moral, as well as legal, obligations. For claims arising after that date, however, a distinct provision was enacted, now Section 1505. While sovereign immunity is waived in respect of tribal claims, there is here no hint that the United States is made liable on theories "not recognized by any existing rule of law or equity." Plainly, the scheme of the Act is to confine claims so based to the past and provide relief for the future on traditional legal grounds alone.

The enactment of separate provisions for past and future wrongs, and the contrast in the language of the two texts, sufficiently reveal the limited scope of Section 1505. But any doubt on this score is erased when we notice the legislative history of the latter section. Congress made clear its intent, for alleged wrongs arising after 1946, to place tribal claimants on an equal footing with persons seeking recovery under 28 U.S.C. 1491:

> As respects claims accruing after its adoption this bill confers jurisdiction on the Court of Claims to determine and adjudicate any tribal claim of a character which would be cognizable in the Court of Claims if the claimant were not an Indian tribe. In such cases the claimants are to be entitled to recover in the

> same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, * * * as in cases brought in the Court of Claims by non-Indians under Section 145 of the Judicial Code (36 Stat. 1136, 28 U.S.C. 250) [now 28 U.S.C. 1491], as amended.

H.R. Rep. No. 1466, 79th Cong., 1st Sess. 13 (1945). See also *Creation of Indian Claims Commission: Hearings on H.R. 1198 and H.R. 1341 Before the House Comm. on Indian Affairs*, 79th Cong., 1st Sess. 149 (1945) (Assistant Solicitor Cohen); *Klamath and Modoc Tribes* v. *United States*, 174 Ct. Cl. 483, 489-490 (1966).

Because, with respect to post-1946 claims, 28 U.S.C. 1505 merely parallels the jurisdictional grant in 28 U.S.C. 1491 for claims that "would be cognizable in the Court of Claims if the claimant were not an Indian tribe" (H.R. Rep. No. 1466, *supra*, at 13), and because the United States is entitled to the same defenses, both at law and in equity, under 28 U.S.C. 1505 as under 28 U.S.C. 1491 (*ibid.*), the conclusion that 28 U.S.C. 1491 "[did] not create any substantive right enforceable against the United States for money damages" (*United States* v. *Testan*, *supra*, 424 U.S. at 398) is equally applicable to the grant of jurisdiction in 28 U.S.C. 1505. The right to recover on a non-constitutional and non-contractual claim based on a "law * * * of the United States" under 28 U.S.C. 1505—as for claims based on an "Act of Congress" under 28 U.S.C. 1491—must therefore be premised on the existence of a substantive right to money damages under some other statute. See *United States* v. *Testan*, *supra*, 424 U.S. at 398-400.[8]

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[8]Petitioners rely (Pet. 11-12) on a passage in the House Report on the Indian Claims Commission Act stating that 28 U.S.C. 1505 was intended to confer jurisdiction over "any controversy with the Federal Government that may arise in the future" (H.R. Rep. No. 1466, *supra*, at 3) as an indication that the Court of Claims has jurisdiction over their claims here under Section 1505. This reliance is misplaced: the sentence in the House Report quoted by petitioner (Pet. 11) states that "the Indian would henceforth have the same right as his white or black neighbor to secure a full and free hearing * * * on any controversy with the Federal Government that may arise in the future." Thus, the passage relied upon by petitioners supports our position that an Indian Tribe pressing a claim under 28 U.S.C. 1505, like any other claimant seeking money damages in the Court of Claims, must point to some other statute creating the right to recover damages.

As noted above (see note 6, *supra*), it is clear that the Menominee Termination Act, which was enacted for the very purpose of removing federal supervison over petitioners and their property, was not intended to create such a right to money damages against the United States merely because the statutory policy of termination was carried into effect. The congressional judgment to terminate federal supervision over the Menominees may have been unwise, as petitioners assert and as Congress itself evidently concluded in 1973 when it enacted the Menominee Restoration Act, (Pub. L. No. 93-197, 87 Stat. 770, 25 U.S.C. 903) reversing its earlier termination decision. But it does not follow that Congress has consented to suit by petitioners on a claim that is premised on nothing more than a dissatisfaction with the manner in which Congress, in enacting the Menominee Termination Act, exercised its plenary power over Indian affairs within the constitutional range of options then available to it.[9] This Court has stated that the decision when to terminate federal supervision over an Indian Tribe is a political one for the Congress. *United States* v. *Waller*, 243 U.S. 452, 459-460 (1917); *United States* v. *Nice*, 241 U.S. 591, 598 (1916); *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913). It would be extraordinary to

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[9]As noted above, claims arising under the Constitution are open for consideration on remand to the Trial Judge (see page 6, *supra*).

conclude that Congress, either in 28 U.S.C. 1505 or the Termination Act itself, consented to the payment of damages if a court should disagree with its political judgment in making a termination decision.

Petitioners also argue (Pet. 11-13) that enactment of the Termination Act was inconsistent with prior treaties and a general fiduciary duty they assert Congress owed to them. But, as the Court of Claims observed, this Court has made clear "that Congress has the unilateral and plenary power (to the extent there is no violation of the Constitution, including the Just Compensation Clause) to abrogate a prior treaty with Indians" (Pet. App. 10a, citing *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903); *Choate* v. *Trapp*, 224 U.S. 665, 670-671 (1912); *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497 (1937); *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 84 (1977); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 587-588, 594, 598 (1977)). Accordingly, there can be no basis for inferring that Congress has consented to a suit for damages whenever a court might conclude that Congress was unwise in exercising its "unilateral and plenary" power to supplant the terms of a treaty through subsequent legislation. A claim premised on a validly supplanted treaty does not "arise[ ] under" a treaty within the meaning of 28 U.S.C. 1505, because whatever rights may have existed thereunder—even assuming they included a right to money damages for a violation—would not survive the valid abrogating statute. Nor is there any basis for inferring that Congress has consented to suit based on a claim that a valid Act of Congress is in violation of some undefined fiduciary duty thought to be owed to an Indian tribe outside of the context of a particular statute or treaty.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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